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No. 94-951

In The

Supreme Court of the United States

October Term, 1994

IN RE ESTATE OF SHELTON A. McHENRY, *Deceased.*
EDWARD S. HALL, *et al.*,

Petitioners,

vs.

THOMAS E. O'SULLIVAN, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The California Court Of Appeals

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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PARTIES

The parties to the proceedings below were Petitioners Edward S. Hall and William Dean Mills, and Respondents Thomas E. O'Sullivan and John T. Lynch. Lynch passed away during the course of these proceedings, and his wife, Elizabeth Lynch, as personal representative of his estate, thus became a party below.

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INTRODUCTION

To attain review in this Court, the temptation to exaggerate or misconstrue the record in the lower courts must be enormous. Petitioners here have yielded to that temptation in the hope of gaining the Court's attention.

The actual showing by Petitioners in the lower courts was repeatedly characterized by conjecture, innuendo and speculation. The courts below heard and considered Petitioners' evidence, and found it to be unreliable, not credible and on occasion, "made up." Petitioners urged the courts below, and now urge this court to hold that because Respondent in this will contest is an attorney, the courts are required to treat conjecture, innuendo and speculation with more deference than contradictory direct evidence.

The California courts' acceptance of reliable, rather than patently unreliable, evidence is the real basis for Petitioners' claim that their right to procedural due process has been abridged. The claim is outlandish.

STATEMENT OF THE CASE

1. FACTUAL SUMMARY

Shelton A. McHenry, a prominent and successful Los Angeles restauranteur, passed away in 1987. He left no wife, no children, no parents, brothers, sisters, aunts or uncles. His closest living relatives consisted of a small group of cousins. McHenry died testate.

In his will, McHenry followed the seasoned pattern of distribution of his property to which he had adhered firmly for more than 35 years, and through the more than dozen versions of his will prepared in that time. McHenry named numerous beneficiaries, including gifts to some of his friends and his cousins of specific items of personal property or amounts of money. However, the bulk of McHenry's estate, the residue, was bequeathed to individuals, neither friends nor relatives, but employees and professionals with whom he had worked most closely in his businesses.

In the early versions of McHenry's wills, which were in evidence in this matter, the number of employee beneficiaries of the residue of his estate was considerable. As McHenry grew older, as he wound down his business affairs and as individuals left his employ, the number of named residuary beneficiaries dwindled until, at the time of his death, there were only two: Respondent John T. Lynch, McHenry's business manager of 15 years, and Respondent Thomas E. O'Sullivan, his lawyer since the early 1950's. O'Sullivan was also the draftsman of McHenry's will.

Petitioner will contestants were two remote cousins of McHenry who had enjoyed little contact with him in his lifetime. Though certain family members claimed to have been close to McHenry, McHenry rarely saw, or spoke of, any of his relatives. He had not spoken of a will to any of them. None were familiar with McHenry's choices or pattern of distribution of his estate; none were familiar with the circumstances under which his will was prepared, or of its content. Nonetheless, the Petitioners alleged virtually every conceivable manner of fraudulent

activity by Lynch and by O'Sullivan in the procurement of the will.

Belying the premise that McHenry had been unduly influenced in preparing his will was a rich body of documentary evidence of the manner in which his wills had been conceived and prepared over the years. McHenry and his first wife Bernice (who predeceased him) were unfailingly meticulous and definite in their estate planning. Over the period McHenry was represented by O'Sullivan, McHenry's will was modified more than a dozen times.

O'Sullivan never participated in the McHenry estate planning other than as a tax advisor and draftsman. McHenry and Bernice (when she was living) gave O'Sullivan extensive and detailed handwritten or typewritten instructions concerning who was in or out of their will, and for what or how much. Numerous original exemplars of the written attention given by the McHenrys to the minutia of their estate plan for the revisions of their wills were in evidence.

Neither Lynch nor O'Sullivan were beneficiaries in the earliest wills prepared for McHenry by O'Sullivan. The residuary beneficiaries in those wills were the then-current restaurant managers and other key personnel retained by the McHenrys. Lynch was unnamed in any McHenry will until he became the McHenrys' restaurant manager in 1972. Bequests to O'Sullivan originated first in the 1960's as modest and contingent, later as modest, and later still as more substantial, with the attrition in the number of residuary beneficiaries designated by McHenry.

Over the years, as he became named a beneficiary of their estate, O'Sullivan addressed the propriety of his preparation of the McHenrys' wills with them on several occasions, and suggested that another individual might prepare their wills. The McHenrys, however, were intensely private individuals who had no direct involvement with lawyers other than O'Sullivan for all the years he represented them. The McHenrys wanted no other lawyer preparing their will despite having been advised, and being aware of, the conflict.

Through the many years and the many changes, there was an almost absolute consistency in McHenry's design of his estate plan. Before her death in 1981, McHenry and his first wife, Bernice, left the entirety of their estates to one another. In the event there were no survivor, with immaterial exceptions, modest specific cash bequests were made to relatives, gifts of personal property were made to friends, and the residue of the estate was left to key employees and retained professionals. As the key employees or professionals employed by McHenry came and went over the years, they would be added or omitted accordingly.

By 1984 and 1985, when McHenry's final will and codicil were prepared, McHenry had suffered a number of setbacks to his health. His vision had degenerated, he had suffered a stroke, and suffered from various ailments. Despite these conditions, according to McHenry's personal physician and others, McHenry's cognitive capacity was unimpaired, and he remained attentive to his affairs, including his estate planning objectives.

After McHenry's will was admitted to probate, the Contestant cousins, discontent with their treatment in McHenry's will, filed their will contest, commencing it one day after expiration of the 120 day period of limitations for filing will contests in California. Thereafter, Petitioners maintained a relentless and slanderous offensive against Lynch and O'Sullivan for more than seven years of litigation. Some seven separate actions attacked the will, all unsuccessful. In them, both Respondents were accused of fraud and conspiracy, destruction of McHenry's "true will" and sundry other fiendish conduct. At least thirteen notices of appeal were filed with the California Court of Appeal, five of which resulted in written opinions.

The first written opinion of the California Court of Appeal of significance here was rendered in an appeal from the granting of O'Sullivan's motion for summary judgment in the will contest, which motion had been made on the ground that the statute of limitations for will contests barred Petitioners' claim. In that Opinion (attached as Appendix Two to the Petition for Writ of Certiorari), the Court of Appeal reversed the summary judgment, citing a presumption of undue influence in transactions between lawyers and clients, and holding that the trial court was obliged to apply "the closest scrutiny" in matters involving the possible abuse of a confidential relationship by attorneys. The Court of Appeal remanded the matter for a trial on the merits on the issue of undue influence.

As the will contest thus proceeded toward trial of the issue of undue influence, another action was filed by Petitioners and others in a less conventional attack on the

will. In this action, Petitioners attempted to probate a "lost or destroyed will" of McHenry, which purported will, they alleged, omitted the gift of the residue to Lynch and O'Sullivan. In this action, Petitioners averred the existence of another, later, will than that which had previously been admitted to probate, the supposed provisions of which will were known to the proponents of that will by "osmosis." Lynch and O'Sullivan were accused of stealing this "true will" of McHenry, and altering or destroying it, purportedly subverting McHenry's real intent of leaving his estate to family members.

In the "destroyed will" action, O'Sullivan moved for summary judgment, on the ground that there was no witness, or other evidence, of the existence or content of the supposed "true will," or of the destruction or alteration of such a will by Respondents. In Petitioners' opposition to the motion, they proffered virtually identical circumstantial "evidence" of supposed misconduct by Lynch and O'Sullivan as that which Petitioners attempted to reoffer and reargue at the trial of the will contest.

The motion for summary judgment in the "destroyed will" action was heard, and granted, by Judge Edward M. Ross, the Presiding Judge of the probate departments in Los Angeles County Superior Court. Petitioners appealed to the California Court of Appeal, which affirmed (The Opinion of the Court of Appeal in the "destroyed will action" accompanies this Brief in Opposition as App. 1-App. 11). Affirming the judgment of the trial court, the Court of Appeal specifically held Petitioners' opposition to the motion (consisting of that proffered circumstantial evidence):

> to be based on conjecture and speculation and insufficient to raise a triable issue of fact as to the existence, destruction and contents of the purported will. (App. 10).

Remaining to be resolved was the trial of the will contest on the issue of undue influence.

Eventually, in November and December, 1992, the trial occurred. In trial, the court adopted Petitioners' position that O'Sullivan had a rigorous burden of proof, and concluded that it had been met:

> This court agrees with [Petitioners] that, in order to prevail, O'Sullivan was required to rebut the presumption by no less than 'clear and satisfactory' or by 'clear and convincing' evidence. Though there is some uncertainty whether the legal standard requires O'Sullivan to produce 'satisfactory' or 'convincing' evidence, the distinction, if any, is of no import here, since the Court concludes that O'Sullivan offered evidence which rebutted the presumption under either standard, and in fact *did so to the even higher standard of 'beyond a reasonable doubt.'* [emphasis added] (App. 26).

The court made every effort to view the evidence in a light favorable to the Petitioners. The court explained:

> In exercising its obligation to examine the circumstances involved in the gift to O'Sullivan, the Court undertook to consider not only the evidence offered by the parties, but also what might have come into evidence despite any deficiencies in the form or substance of presentation of evidence by [Petitioners'] counsel or what might have been presented if [Petitioners'] original counsel had been more adept. (App. 25).

The trial court, in a 32 page Statement of Decision (attached to this Brief in Opposition as App. 12-App. 44), reviewed and commented extensively on the evidence. The court found, based on the evidence, that the residuary gifts made by McHenry were of his own volition. The court further found, despite the respective relationships of O'Sullivan and Lynch to McHenry, there to have been no evidence of any kind of fraud or undue influence, nor evidence presented "that would raise an independent inference or suspicion, let alone proof" of fraud or undue influence by either of them. (App. 43). Instead, Judge Ross characterized the action as a personal vendetta by counsel for Petitioners (attorney Thomas J. Jeffers, Jr.) against O'Sullivan.

Petitioners, after unsuccessfully moving for a new trial, appealed anew to the California Court of Appeal, and the matter was assigned to the same three-member panel which had remanded the matter to the trial for "the closest scrutiny." In their briefs, Petitioners essentially urged the California Court of Appeal (as they now ask this court) to reweigh the evidence offered at trial, and in particular to reconsider factual issues which had long since been resolved in the "destroyed will" action.

Ignoring the applicable rules of appellate practice, Petitioners presented the California Court of Appeal a rather one-sided view of the record, mentioning only those matters which they evidently thought tended to indicate wrongdoing by Lynch and O'Sullivan. The appellate panel commented:

> In making their arguments, appellants give lip service to the substantial evidence standard. Yet those portions of the record purportedly

> establishing fraud and undue influence are summarized in vivid detail, to the exclusion of much of the evidence favoring respondents. (Pet. App. 17a).

The Court of Appeal again affirmed, declining to reconsider determinations which had been finally resolved in the "destroyed will action" (See, Petition, page 27a). The court held, among other things, that:

> [S]ubstantial evidence supports the trial court's finding that O'Sullivan sustained his burden of proving by clear and convincing evidence that no undue influence was brought to bear in connection with the challenged residuary clause. (Pet. App. 20a).

In so holding, the Court of Appeal reviewed the procedural history of the case and the evidence at length to support its conclusion that the heightened standard of proof applicable to O'Sullivan at trial had been met. The Court, further, commented on its impression that Petitioners' "unrelenting, overzealous attack on the residuary gift to Lynch and O'Sullivan was, at times, of questionable legal merit" and on the "multiplicity of meritless contentions" raised by Petitioners in their appeal. (Pet. App. 32a).

The California Supreme Court, appropriately, denied review.

2. EXCEPTIONS TO THE PETITIONERS' STATEMENT OF THE CASE

In their Statement of the Case, naturally crafted to create the impression of procedural unfairness in the courts below, Petitioners pick very selectively from the

record, omitting mention of or discounting evidence supporting the judgment, in an effort to create the impression that the trial court weighed the evidence incorrectly. As in their brief in the courts below, Petitioners have made a number of factual assertions which are either subtly or are plainly inaccurate, or which consist of mere argument about the inferences Petitioners wish the trial court would have drawn from their "evidence." Without the time or space to identify and comment fully on each instance of disputed matter in the Petitioners' Statement of the Case, Respondents will discuss only several.

Early on in their Petition, Petitioners discuss the reversal by the California Court of Appeal of the summary judgment based on the statute of limitations for will contests, making detailed reference to so-called "undisputed evidence of extrinsic fraud by O'Sullivan" (Petition, page 4) as having been mentioned by the Court in its Opinion. The impression clearly intended is that there was undisputed evidence of fraud or undue influence which was ultimately ignored by the lower court. Such clearly was not the case.

The motion for summary judgment underlying that Opinion was based on a number of discrete issues, and the evidence offered by O'Sullivan in that motion was naturally limited to those issues. Petitioners proffered the "undisputed evidence" in opposition to the motion, which evidence O'Sullivan considered not apposite to the issues on which the trial court would rule (a position with which the trial court agreed). In any case, for O'Sullivan to have disputed the evidence, even if relevant, would have created a triable issue of fact, and would

have been self-defeating. Thus, the fact that certain evidence was undisputed for the purpose of that limited proceeding is hardly availing. At trial, the premise that there had been any undue influence or fraudulent conduct on the part either of O'Sullivan or Lynch in the procurement of the will was found to have been entirely rebutted by evidence beyond a reasonable doubt.

Petitioners elsewhere state that the trial judge granted O'Sullivan "unusual deference" in permitting presentation of the bulk of his testimony in the form of a 31 page sworn statement (Petition, page 7). This point is misleading because, (1) the trial court ordered the parties to consider ways to expedite presentation of evidence, suggesting summaries of testimony in written form (a common practice in many courts designed to economize precious trial resources), and (2) O'Sullivan submitted to extensive cross-examination on the content of his written statement and on other matters. In addition, the trial court specifically noted that O'Sullivan's testimony had been corroborated by the documentary evidence in the case.

In a manner more in the nature of argument than of historical perspective, Petitioners state that "drastically changed circumstances . . . put continuation of any such 'patterns' " in McHenry's estate planning "in question." Why the event of a heart attack, vision loss, or the like should necessarily have affected a donative philosophy followed over a thirty-plus year span is entirely unclear; the trial court and the Court of Appeal each commented on the evidence concerning McHenry's condition when he executed his will and codicil, and concluded differently.

Petitioners' comment that the court "refused to find relevance in conduct by both McHenry and O'Sullivan circumstantially contradicting O'Sullivan's version of events" apparently refers to the proffered evidence by counsel Jeffers that when McHenry signed his will in 1984, he thought he was signing divorce papers. In fact, the trial court did not comment that such evidence was irrelevant, but that the "evidence" was simply not believed by the court. In considering that particular evidence, the court was clearly mindful of procedural due process:

> Besides the weakness of the evidence, the premise that McHenry signed a will when he thought he was signing divorce papers, was highly suspect. Though this action had been pending for more than five years, and though the [Petitioners] had long been familiar with the witnesses offered to support their theory, such premise was not mentioned by [Petitioners] in discovery, and, indeed, did not emerge until the time of trial. ¶ It is apparent to the court that, in this connection, Mr. Jeffers made up the trial as he went along. Mr. Jeffers' statement that, after five years he had just realized that O'Sullivan had slipped a will in amongst divorce papers was nonsensical and symptomatic of the bad faith that was demonstrated in the manner in which Mr. Jeffers conducted this trial. Not only were [Petitioners] trying to conduct a trial by ambush, which the Court would not permit, but the premise itself was too raw for this Court to accept. . . . (App. 31).

The court did not refuse to consider such "circumstantial evidence," and did not dismiss its potential relevance. Instead, the court declared the evidence to be "weak."

As to other "circumstantial evidence" vaguely alluded to in the Petition, generally concerning the supposedly nefarious alteration or destruction of a will by Lynch and O'Sullivan, these issues had, before the trial began, been finally resolved in Respondents' favor in the "destroyed will" action, and it would have been improper for the court to have relitigated them in the trial of the will contest.

Contrary to the implication that the finding of consistency in McHenry's estate plan was based on opinions to which O'Sullivan testified, the finding was based on detailed documentary evidence, consisting of specimens of each of McHenry's wills and codicils, and many instances of original detailed handwritten and typewritten instructions by the McHenrys for preparation of the wills.

On the matter of the advice given to the McHenrys about O'Sullivan's conflict of interest in preparation of the McHenry wills, Petitioners incorrectly characterize O'Sullivan's testimony about advice to the McHenrys to seek outside counsel. O'Sullivan testified at trial that because of the conflict of interest, he suggested that McHenry should consider retaining separate counsel, and asked McHenry several times over the years if he wanted to do so. O'Sullivan was candidly unable to recall specific details of those discussions, which occurred over a period of 35 years. Obviously, as the trial court and the Court of Appeal observed, O'Sullivan did not protect himself by

obtaining written waivers of the conflict from the McHenrys. However, as the trial court pointed out, the failure to have obtained written waivers, did not itself resolve the factual question of whether McHenry was unduly influenced to make the residuary gift. The court was quite clearly convinced of McHenry's independent thought processes by other evidence. It said:

> While not having protected himself by having written waivers in each instance by the McHenrys is hardly a recommended practice, it appears that McHenry would have wanted to have O'Sullivan prepare the Will in any case. More important, based on the McHenrys' long-standing testamentary pattern, O'Sullivan does not appear to this Court to have influenced McHenry to make a gift to him, either properly or improperly. (App. 37).

Petitioners argue that because of certain events in McHenry's life in 1984, tax issues should have been raised with McHenry in connection with his 1984 will which were not. The argument is not based on any evidence offered at the trial about the need for tax advice and is just made up. No evidence of any kind was offered concerning tax advice given (or not given) by O'Sullivan in connection with the sale of McHenry's businesses. The purported tax issues raised by the death of McHenry's first wife, Bernice, and his subsequent remarriage (which ended in divorce before the 1985 codicil republished his will) are a red-herring, indicative of the attenuated inferences Petitioners insist the trial court was required to draw. The tax issue referred to by Petitioners is the so-called "marital deduction."

If their argument is not purely disingenuous, Petitioners apparently have not yet grasped the import of the evidence. The various wills admitted to evidence showed conclusively that the marital deduction was employed to its fullest in the reciprocal estate plans McHenry executed with his first wife, Bernice. McHenry and his wife were able to be availed of full use of the tax-deferring measure, because McHenry and his first wife left their estates entirely to one another. The idea that, for tax reasons McHenry would have left his second wife a larger gift than the specific cash bequest provided for her (included in his will, and *omitted* in his codicil) is contrary to the evidence offered by Petitioners. Ironically, Petitioners themselves offered proof that McHenry intended to divorce his second wife at the time he executed his will.

Petitioners refer to their "two-fold attack" on O'Sullivan's position. The first prong of this attack, that O'Sullivan's evidence was insufficient to overcome the presumption of undue influence, was not accepted by the trial court, which considered the evidence overwhelming, or by the Court of Appeal, which found substantial evidence to support the trial court's application of the relevant standard of proof, be it clear and convincing, or higher.

The second prong of this "two-fold attack" was, and apparently is again, to present unsupported conclusions as facts (e.g., the disputed statement that "O'Sullivan acted in a way that strongly suggested he was aware that he took advantage . . . "), and to selectively reargue evidence which was found to be unconvincing by the trial court, or which was already the subject of a final judgment in the "destroyed will" action. Petitioners offer

these "facts" in an illusive manner in their Petition, omitting mention that many such "facts" were disputed by their own witnesses, or offered by witnesses whose testimony was found by the court not to have been credible.

As an example, Petitioners characterize evidence concerning McHenry's visual acuity, attempting to infer that because McHenry could not see, O'Sullivan "put things in the will". The trial court, however, received the proffered evidence about McHenry's vision; Petitioners' own expert testified not only that McHenry was not blind, but that it would have been possible for McHenry to read type smaller than was contained in his will. (App. 22). Moreover, there was nothing other than pure conjecture by Petitioners, to suggest that O'Sullivan "put" anything in the will other than as instructed by McHenry.

The discussion by Petitioners of McHenry's purported intention to make a $300,000 bequest to his chauffeur in his 1984 will is another example of Petitioners' misleading characterization of the record. The trial court, rather than ignoring this "evidence," discussed it at length in its Statement of Decision, (App. 37) pointing out, among other things, that the testimony of Petitioners' own witness, nurse Gladys DuBois, discredited the evidence.

Petitioners mention that O'Sullivan "claimed" not to have worked on McHenry's "divorce papers," omitting mention of the fact that the papers were prepared by O'Sullivan's law firm and signed by O'Sullivan.

One remarkable statement in the Petition concerns McHenry's execution of the 1985 codicil (which republished the 1984 will, subject to the amendments contained in the codicil). It is said by Petitioners that McHenry

made and executed this codicil "without O'Sullivan's assistance". The obvious, and incongruous, implication of execution of the codicil without O'Sullivan's involvement would be that McHenry republished the will, containing the residuary gifts to Lynch and O'Sullivan, in such a way that O'Sullivan was not in a position to have unduly influenced McHenry. In fact, though, the evidence clearly was that O'Sullivan did prepare the codicil on McHenry's instructions. This misinformation, and various other innuendo in the Petition appear to have been proffered in an effort to imply that O'Sullivan was not a credible witness. The trial court, however, specifically found otherwise. (App. 28).

Clearly, Petitioners have been motivated to apply a spin on the "facts" that will interest this Court. However, the content of the Petition ignores the weight of evidence in the record, and utterly fails to address the actual fact-finding and reasoning both of the trial court and the California Court of Appeal.

REASONS FOR DENYING THE WRIT

Petitioners Hall and Mills have attempted in their submission to this Court to articulate two grounds for review. Neither of them is of merit.

The apparently more significant of the issues was not raised in the courts below by Petitioners. Petitioners assert that in order for them to have been afforded procedural due process, the California appellate courts were required to apply a stringent, unarticulated standard of review to the findings of the trial court, in order to

preserve the integrity of the California Bar. As discussed below, the integrity of the California Bar is the province of the California courts, and, in any case, no Constitutional issue is raised by the proper application of California's "substantial evidence" standard of review to the trial court's findings.

Petitioners also posit vaguely and broadly that the Constitution requires courts to allow proof, in claims against lawyers, by circumstantial evidence. Even if there were some merit to such a contention, this would clearly be a poor case in which to raise it. As even the limited record here demonstrates, rather than having prevented Petitioners from making proof of their claim by circumstantial evidence, the trial court liberally admitted circumstantial evidence, and was simply not convinced by it. Regardless, as discussed briefly below, this Court should decline the invitation to review the evidence in this case *de novo*.

1. THERE HAS BEEN NO DENIAL OF PROCEDURAL DUE PROCESS

Petitioners argue that the appellate court failed to apply a standard of review which would protect Petitioners' due process rights, in a case where the standard of proof at trial required O'Sullivan to prove by "clear and convincing evidence" or by "clear and satisfactory evidence" that McHenry was not unduly influenced. This hardly appears to be a matter in which there has been a denial of procedural due process to Petitioners. Instead, even from the limited record, it quite clearly is a case in which Petitioners have received a surplus of due process.

Petitioners have pursued this matter zealously, even obsessively, availing themselves of appellate review at each turn. Petitioners have been so implacable, that they have never been willing to address, much less acknowledge the overwhelming weight of evidence which supported the judgment. They have stubbornly refused to exhibit recognition of the very basic premise of trial practice that innuendo and conjecture are not good evidence.

At each stage of the judicial process, under various pretenses, Petitioners have, in effect, sought *de novo* review, as if each court had an obligation to review the record in its entirety and second-guess the trial judge, with whom Petitioners so strongly disagree. This, of course, reflects a fundamental misapprehension of the role of appellate court, which is not intended to be the trier of fact. It is not the burden, nor the proper function, of higher courts to reweigh evidence.

Perhaps because of the prevailing atmosphere of lawyer-bashing, Petitioners have presumed all along that the courts would see a lawyer receiving a gift in a will prepared by him as so intrinsically evil that the courts would repudiate the right of the lawyer to defend his conduct, and would suspend the rules of evidence to permit Petitioners to introduce any form of innuendo or speculation as their proof.

In fact, the California courts appropriately consider receipt by a lawyer/draftsman of a gift from a will as so inherently suspicious that they created a rebuttable presumption of undue influence against the lawyer-beneficiary, and require the lawyer to prove affirmatively, by clear and convincing evidence, the negative; that the

client made the gift to the lawyer of his own volition, i.e., that there was no undue influence involved. This is the difficult burden that faced O'Sullivan below. The evidence he offered to successfully satisfy the burden is discussed at significant length in the record.

Petitioners contend that the burden of proof placed on O'Sullivan calls for an augmented standard of review by the appellate court. Petitioners fail to grasp that, under the substantial evidence standard of review, which was correctly applied in this case, the appellate courts are called upon to review the evidence *as it applies to the standard of proof required at the trial level*, whether it is a "preponderance of evidence" standard of proof or the "clear and convincing evidence" standard of proof.

Petitioners' suggestion that a more stringent standard of review should apply in this case displays an obvious misunderstanding of the roles of the appellate courts and trial courts and the application of the substantial evidence test, and also ignores the fact that both the trial court and appellate court herein followed the correct standards; the trial court in fact applied even a more rigorous standard than was required under California law.

As the California Supreme Court reiterated in *Crail v. Blakely*, 8 Cal. 3d 744, 750, 505 P.2d 1027, 1031, 106 Cal. Rptr. 187, 192 (1973):

> "The sufficiency of evidence to establish a given fact, where the law requires proof of the fact to be clear and convincing is primarily a question for the trial court to determine, and if there is substantial evidence to support its conclusion, the determination is not open to review

> on appeal." (Nat. Auto. & Cas. Co. v. Inc. Acc. Com., 34 Cal. 2d 20, 25, 206 P.2d 841, 843 (citations omitted)).

8 Cal. 3d 744 at 750.

In *Crail*, the court was faced with an appeal from an action to enforce an oral agreement between plaintiffs' deceased parents regarding the disposition of their estate. Recognizing that the court was required to and did apply a "clear and convincing" standard in weighing the plaintiffs' testimony, the court said that:

> That standard was adopted, however, for the edification and guidance of the trial court, and was not intended as a standard for appellate review.

Id.

The application of the substantial evidence review in a case requiring a stringent burden of proof at trial was explained in the recently decided case of *Hoch v. Allied-Signal, Inc./Bendix Safety Restraints Division*, 24 Cal. App. 4th 48, 29 Cal. Rptr. 2d 615 (1994). In *Hoch*, a special administrator for a decedent sought punitive damages in a survival action arising from the car accident that killed the decedent. The trial court granted nonsuit on the issue of punitive damages, finding insufficient evidence that Allied-Signal had consciously disregarded decedent's rights.

The appellate court employed a substantial evidence test in determining whether the nonsuit could be supported. 24 Cal. App. 4th at 58. Allied-Signal contended, as do Petitioners here, that since the plaintiff's burden at trial on the punitive damages claim was to establish

oppression, fraud or malice by clear and convincing evidence, this more rigorous evidentiary standard should also apply on review of a nonsuit granted. The appellate court disagreed, citing to *Crail, supra,* but noted that the appellate courts must keep in mind the higher standard of proof in viewing the evidence. *Id.*

The *Hoch* court of appeal analogized to the proof required in criminal cases, ironically citing *Jackson v. Virginia,* 443 U.S. 307 (1979), which is cited by Petitioners herein. In a criminal case, the evidence is sufficient to support a conviction if a reasonable trier of fact could have found that the burden of proof of "beyond a reasonable doubt" was sustained by the prosecution. The *Hoch* court explained:

> The evidence need not convince the reviewing court beyond a reasonable doubt, but must be substantial enough for a reasonable trier of fact to have convicted on that standard. [citation omitted]. . . . Analogously, a motion for nonsuit in a case requiring clear and convincing evidence should be granted only if the trial court determines no reasonable jury could find the plaintiff has presented clear and convincing evidence on the disputed issue.

24 Cal. App. 4th at 60.

There are many other examples of the application of the substantial evidence standard of review by California appellate courts in cases in which the litigants were circumscribed at the trial level by the stringent "clear and convincing" burden of proof. See, e.g., *In re Phillip B.,* 92 Cal. App. 3d 796, 156 Cal. Rptr. 48 (1979) (substantial evidence standard of review applied in case where clear

and convincing burden of proof was required by the due process Clause of the Fourteenth Amendment in juvenile dependency proceeding); *Cochran v. Board of Supervisors of Del Norte County*, 85 Cal. App. 3d 75, 149 Cal. Rptr. 304 (1978) (whereas burden of proving a parol partnership is by clear and convincing evidence, appellate review is limited to determination of whether substantial evidence supports trial court or agency's conclusions).

In the case at bar, the trial court made clear that the standard under which O'Sullivan was required to rebut the presumption of undue influence was either "clear and satisfactory" or "clear and convincing." The court found that, in any event, O'Sullivan had offered evidence which rebutted the presumption not only meeting those burdens of proof, but in fact had met the inapplicable higher standard of "beyond a reasonable doubt."

In reviewing the trial court's decision, the California Court of Appeal was cognizant that the substantial evidence test was being applied to a stringent standard of proof at trial. The court specifically found there to have been substantial evidence to have supported the trial court's finding that O'Sullivan sustained his burden of proving, by clear and convincing evidence, that there had been no undue influence in the rendering of the residuary clause. (Pet. App. 20a).

Petitioners' contention that their due process rights were violated is to no avail, inasmuch as the California Court of Appeal determined that there was substantial evidence to uphold a judgment based on O'Sullivan's proof beyond a reasonable doubt that McHenry was not

unduly influenced. As the California Court of Appeal has remarked:

> With rhythmic regularity it is necessary for us to say that where findings are attacked for insufficiency of the evidence, our power begins and ends with a determination as to whether there is *any* substantial evidence to support them; that we have no power to judge of the effect or value of the evidence, to consider the credibility of the witnesses, or to resolve conflicts in the evidence or in the reasonable inferences that may be drawn therefrom. Nobody seems to listen.

Overton v. Vita-Food Corporation, 94 Cal. App. 2d 367, 370, 210 P.2d 757, 759 (1949).

Petitioners cite to only two cases, both inapposite, to support their urging for some augmented standard of review on appeal. In *Honda Motor Co., Ltd. v. Oberg*, ___ U.S. ___, 114 S.Ct. 2331 (1994), the Court held that the State of Oregon's Constitution denied due process by *prohibiting* judicial review of the size of punitive damages awards. The Court specifically did not reach the issue of what standard of review is constitutionally required in punitive damage cases. 114 S.Ct at 2341 n.10. *Honda* is not on point.

In the other case cited by Petitioners, *Jackson v. Virginia*, 443 U.S. 307 (1979), the Court discussed the standard of review for habeas corpus relief, also not relevant or analogous to the situation at bar.

Petitioners' position is, in essence, that when a lawyer is a party to a proceeding in a will contest case, the

United States Constitution requires that the appellate court must employ a standard of review higher than that utilized in other civil matters. The only articulated reason Petitioners offer for their argument that the Due Process Clause of the Fourteenth Amendment requires some higher appellate standard of review in cases such as this is "to protect the integrity of the bar." However, it is the duty of the separate state and federal judicial systems to control the conduct of their own officers, among whom lawyers are included. *Theard v. United States*, 354 U.S. 278, 281 (1957). This Court is hardly bound by virtue of the Fourteenth Amendment to protect the honor of any bar, or in particular the State Bar of California which is regulated by the Supreme Court of California. *Ramirez v. State Bar of California*, 28 Cal. 3d 402, 411, 169 Cal. Rptr. 206, 211, 619 P.2d 399, 404 (1980).

Further, California courts have long recognized that there is no basis for subjecting judgments in will contest cases to a higher standard of scrutiny on appeal. "The rules of evidence, the weight to be accorded to the evidence, and the province of a reviewing court, are the same in a will contest as in any other civil case." *Estate of Bristol*, 23 Cal.2d 221, 223, 143 P.2d 689, 690 (1943) (applying substantial evidence standard of review). "When a finding of fact is attacked on the ground that there is not any substantial evidence to sustain it, the power of the appellate court *begins* and *ends* with the determination of whether there is any substantial evidence contradicted or uncontradicted which will support the finding of fact." *Foreman & Clark Corp. v. Fallon*, 3 Cal. 3d 875, 881, 92 Cal. Rptr. 162, 165-66, 479 P.2d 362, 365 (1971).

Petitioners provide no compelling case on Fourteenth Amendment grounds for requiring a more stringent standard of appellate review than that which California courts have traditionally employed. "If a thing has been practised for two hundered years by common consent, it will need a strong case for the Fourteenth Amendment to affect it." *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 17 (1991). Notwithstanding Petitioners' urging, the Due Process Clause does not warrant suddenly overturning California's appellate standard of review for this or any similar action.

2. PETITIONERS' DUE PROCESS RIGHTS WERE NOT ABRIDGED BY ANY REFUSAL OF THE LOWER COURTS TO CONSIDER CIRCUMSTANTIAL EVIDENCE

As mentioned above, it is apparent that the trial court gave Petitioners broad latitude in the admissibility of "circumstantial evidence". To whatever extent the trial court deemed irrelevant certain circumstantial evidence, it is unapparent from the Petition that the court abused its discretion in so doing. On the other hand, it is apparent from the materials appended to the Petition and this Opposition Brief that the court's consideration of circumstantial evidence, and reluctance to consider certain of it, was given due attention. It is not a violation of a party's right to procedural Due Process for a court to refuse to admit evidence which is irrelevant, or which is excluded based on other widely recognized evidentiary policies.

Many of the evidentiary rulings of the trial court were the subject of Petitioners' appeals and were considered by the Court of Appeal under the appropriate abuse

of discretion standard established under California law. E.g., *Decter v. Stevenson Properties*, 39 Cal. 2d 407, 420, 247 P.2d 11, 18 (1952). If Petitioners mean to suggest that this Court should enunciate a different standard of review for discretionary rulings, it is not discernable from the Petition.

CONCLUSION

Petitioners raise no question, based on the conduct of the proceedings below, of denial of their right to procedural due process. Nor do Petitioners provide a compelling reason for this Court to create a heightened standard of review for matters involving the conduct of attorneys. Such issues are properly addressed by the courts of the respective states, not by this Court. Here, for apparently good reasons, the Supreme Court of California would not disturb the judgment. Likewise, the Petition for Writ of Certiorari should be denied.

Dated: December 27, 1994

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NOT FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

Estate of SHELTON A. McHENRY, Deceased.	
BEATRICE CUNNINGHAM MOORMAN et al., Petitioners and Appellants. v. THOMAS E. O'Sullivan et al., Objectors and Respondents.	No. B 067397 (Super.Ct.No. P 718563 (Filed Dec. 3, 1993)

Beatrice Cunningham Moorman, and others, appellants herein, appeal the granting of summary judgment against them denying their petition to probate a destroyed will.

The decedent, Shelton McHenry, died on July 14, 1987, leaving a considerable estate. His will, executed in May 1984 and a 1985 codicil thereto, were admitted to probate on August 24, 1987. Under the 1984 will, specific cash bequests were made to a number of friends, employees and relatives, ranging in amounts from $5,000

to $50,000.[1] The residue of the decedent's estate was left to the respondents herein, the decedent's attorney, Thomas E. O'Sullivan, and the decedent's former business manager, John T. Lynch.

The decedent was survived by a number of relatives, the closest of whom were first cousins. Several of the cousins thereafter filed various will contests to displace the probated will. Those efforts have thus far been unsuccessful.[2]

The proceedings which resulted in the judgment in issue here began on November 21, 1990, when Moorman filed a verified "Petition for Probate of Destroyed Will and for Letters of Administration with Will Annexed."[3] In the petition Moorman requested that "decedent's destroyed will" be admitted to probate. The petition alleged that the destroyed will was dated sometime after April 20, 1985. (April 20, 1985, was the date of execution by decedent of the codicil to the will.) As to the substance

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[1] The 1985 codicil merely deleted specific cash bequests to the decedent's deceased mother and his seond wife.

[2] These proceedings have been the subject of numerous previous appeals in this court, some of which are still pending. Trial on the contest of the probated 1984 will and 1985 codicil was pending as of the date of the judgment in this case. Our decision in this case does not, of course, affect the other matters that are still pending.

[3] Initially, Moorman was named as the sole petitioner. However, in later filed papers, the other appellants, Edward Hall, David McDaniel, Dennis McDaniel, Jerry McDaniel, Roy Dyas, William Mills, Debra McDaniel, Myrtle Martin and Francis O'Highley, were also named as proponents of the destroyed will. All proponents were and are presently represented by the same attorney.

of the destroyed will, Moorman alleged it contained 17 specific bequests to non-relatives and a bequest to Terry Gillard, in an amount "to be determined by competent witnesses." As for the residue, the petition alleged, "The balance of the estate to go to decedent's *'Handful of relatives'* who are cousins of the decedent and only heirs" and listed their names.[4]

Respondents filed contests to the petition for probate of the destroyed will, challenging that the purported will ever existed. The matter then became at issue with trial scheduled to commence on December 23, 1991.

On November 14, 1991, O'Sullivan moved for summary judgment on appellants' petition.[5] Lynch joined in the motion and hearing on the motion was set for December 17, 1991. On November 26, 1991, while respondents' summary judgment motion was pending, Moorman filed a document entitled "Supplement to Petition for Probate of Destroyed Will and for Letters of Administration with the Will Annexed." In this verified document, Moorman changed her earlier position that the "[D]estroyed will had been dated after April 20, 1985," stating that the probated will was in fact the decedent's "true will," and that all but the signature pages of the probated will had been destroyed and that pages in the will had either been substituted or altered in some fashion. She further swore that on the date of the decedent's death, the respondents

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[4] The appellants are either listed in the petition as a part of the "handful of relatives" or are heirs of those listed.

[5] On October 25, 1991, appellants filed their own summary judgment motion. Their motion was denied on November 22, 1991.

went into the decedent's safe and removed the true will and substituted or altered some pages "to accomplish what they wanted to accomplish, to gain the estate for their personal benefit and gain."

Respondents submitted the following evidence in support of their summary judgment motions. O'Sullivan had been the decedent's business and personal attorney for over 30 years. He prepared numerous wills for both decedent and his first wife, Bernice. Between 1960 and 1985, the decedent executed a series of nine wills and three codicils. Sometimes the McHenrys kept their original wills themselves and sometimes they had O'Sullivan keep their originals [sic] wills for safekeeping. He kept for safekeeping the decedent's original will of May 23, 1984 and the original codicil of April 20, 1985, the documents that were admitted to probate.

Beginning with the 1965 will, O'Sullivan was designated to receive five percent of the estate residue. He was to receive the same under the 1967 will. Then, beginning with the will of June 30, 1969, O'Sullivan's percentage share began to increase. He was to receive 14 percent under the 1969 will, 16.5 percent under the 1971 will, 15 percent under the 1972, 1975 and 1976 wills and 50 percent under the 1981 and 1984 wills.

Lynch also was named as a residual beneficiary. He was to receive 35 percent under the 1972 codicil. His share was increased to 55 percent in both the codicil of 1975 and the will of 1976. The amount was later reduced to 50 percent under the wills of 1981 and 1984.

The last testamentary document prepared for the decedent was his 1985 codicil. O'Sullivan knew of no other person who prepared any will for the decedent.

The decedent had no brothers or sisters and his parents and his wife, Bernice, predeceased him. He had first and second cousins with whom he was not particularly close. While the decedent left specific cash bequests to certain relatives and friends, since 1960 the decedent left the residue of his estate to those employees who helped him earn it.

After learning of the decedent's death on the morning of July 14, 1987, O'Sullivan went to the decedent's apartment residence. He was concerned about an expensive watch that the decedent owned. Lynch arrived about the same time. Upon entering the apartment, O'Sullivan asked Terry Gillard, the decedent's personal attendant and chauffeur, where the watch was kept. Gillard indicated the watch was in the decedent's personal safe and he attempted to open the safe for O'Sullivan. When Gillard had some difficulty opening the safe, he gave the combination to O'Sullivan, who was able to open it. Upon opening the safe, O'Sullivan looked through its contents and found the watch he was looking for. He removed the watch and placed it in a safe deposit box. At no time did O'Sullivan see or remove any will from the safe nor did he destroy any will of the decedent.

In opposition to summary judgment and to support their contention that the decedent's "true will" was destroyed, appellants mainly relied on evidence from Terry Gillard and appellant Moorman. Gillard presented

evidence by declaration and by deposition. In his declaration, Gillard stated that on the day of decedent's death, O'Sullivan and Lynch went to decedent's safe. There were several envelopes in the safe. One of the envelopes was labelled "IMPORTANT DOCUMENTS" and another was labelled "WILL." O'Sullivan took the papers out of the safe and said, "This is it." O'Sullivan and Lynch then both left the apartment with the papers.

Gillard's deposition was later taken. According to that testimony, the decedent, at one time, had asked Gillard to inventory the watches, rings, cuff links and other jewelry in his safe. While doing so, Gillard saw some papers which he moved around but did not open or read. He did observe writing on the outside of some envelopes. He identified Lynch's handwriting on some and O'Sullivan's on others. The envelopes were sealed and some had dates written on them. He recalled 1981, 1984 and 1985. Another envelope, yellow in color, was labelled "IMPORTANT DOCUMENTS." Another envelope was labelled "WILL." Apparently the years 1981 and 1984 were also written on that envelope. It was approximately 8½ by 11 inches and was the only document labelled "WILL" in the safe. On the morning of decedent's death O'Sullivan removed only one envelope from the safe. It was approximately 8½ by 11 inches in size, appeared yellow in color and looked like the "faded one" with the years 1981 and 1984 on it.

The evidence from appellant Moorman was also by declaration and deposition. In her declaration, Moorman stated that she and the decedent were cousins. She frequently visited with the decedent, and she was very close to both the decedent and his first wife, Bernice. Decedent

spoke with Moorman on several occasions about "How his estate would go." He indicated that both Terry Gillard and Moorman's mother would always be taken care of, and that the rest would go to the "handful of relatives." That handful of relatives would have been Harold McDaniel, Archibald McDaniel, Claude Cunningham, Myrtle Martin, Francis O'Highley, Edward S. Hall, William Dean Mills and Roy E. Dyas.

At her deposition, however, Moorman admitted that she did not know if the decedent had ever created a will. She also admitted that the decedent never told her that he was going to leave a specific amount of money to any specific person nor did he ever tell her who the "handful of relatives" actually included and nor was she told any specific amount that those relatives were to receive. She had no idea whether those relatives were to take in equal shares or in different amounts. She had never seen the will that was purportedly destroyed nor did she know that it was actually destroyed. She could not testify as to any single provision of the will.

The summary judgment motion was heard on December 17, 1991. The trial court granted respondents judgment on the will contest and denied the petition for probate of the "lost or destroyed will." Judgment was entered on March 19, 1992. Appellants then filed their appeal.

A will may be admitted to probate even though the original document has been lost or destroyed. (Prob. Code, § 8000. subd. (b).) The procedures are governed by statute. (*Ahlborn v. Peters* (1940) 37 Cal.App.2d 698, 702.) Formerly, under Probate Code section 350, to probate a

lost or destroyed will, the provisions of the will had to be "clearly and distinctly proved by at least two credible witnesses." (*Estate of Thompson* (1941) 44 Cal.App.2d 774, 776.) In 1982, the California Law Revision Commission issued a recommendation that the requirements of Probate Code section 350 be relaxed. The commission stated that "The rule that denies probate to a missing will under these circumstances – in cases where there is no reasonable doubt that there was such a will and that it was valid and unrevoked at the testator's death – is a substantial defect in California Law." (16 Cal. Law Revision Com. Rep. (Dec. 1982) p. 2327.)

As a result of the commission's recommendation, Probate Code section 8223 was enacted, which provides as follows: "The petition for probate of a lost or destroyed will shall include a written statement of the testamentary words or their substance. If the will is proved, the provisions of the will shall be set forth in the order admitting the will to probate."

Appellants contends [sic] that "Probate Code section 8223 is more liberal in construction than prior Probate Code section 350" and therefore summary judgment was improperly granted. We do not agree. Probate Code section 8223 has not "liberalized" prior law to the extent that it eliminates the requirement that the contents of the will be proved. It changes the manner in which the contents may be proved. As the commission stated, "The proposed law repeals California's extraordinary proof and two-witness requirements for proof of the terms of a missing will. It adopts the rule that proof is by a preponderance of the evidence and requires no minimum number of witnesses. This will avoid the situation where the terms

of a valid and unrevoked will *are known* but nonetheless not provable." (16 Cal. Law Revision Com. Rep., *supra*, at p. 2328, emphasis added.) The provisions of a destroyed will must still be establised [sic] before it may be admitted to probate.

"The party opposing the summary judgment cannot rely on its pleadings, but must make an independent showing by a proper declaration or by reference to a deposition or another discovery product that there is sufficient proof of the matters alleged to raise a triable question of fact if the moving party's evidence, standing alone, is sufficient to entitle the party to judgment. [Citations.] Moreover, the opposition to summary judgment will be deemed insufficient when it is essentially conclusionary, argumentative or based on conjecture and speculation. [Citations.]" (*Buehler v. Alpha Beta Co.* (1990) 224 Cal.App.3d 729, 733.)

In ruling on the motion, the court commented to appellants' counsel that although he was given half a dozen opportunities to indicate to the court the name of a single person who has seen a document he wants admitted as a lost or destroyed will, he was unable to do so. We agree with the trial court's assessment. Respondents presented evidence that the 1984 will and the 1985 codicil were the last testamentary documents executed by the defendant and that no purported "true will" was ever destroyed. In opposition, appellants have not presented any evidence as to the existence or destruction of decedent's "true will," much less what that purported will provided. Gillard did not know what envelope O'Sullivan took from the safe or what it contained. According to appellant Moorman, the residue of decedent's estate was

to be shared by a "handful of relatives." Yet Moorman admitted in deposition that she had never seen a will of the decedent before his death. She also admitted that the decedent never actually identified the "handful of relatives" who were to take under the purported will, nor did he indicate what amounts these relatives were to receive, or whether their shares were to be equal or in different proportions. We hold appellants' opposition to be based on conjecture and speculation and insufficient to raise a triable issue of fact as to the existence, destruction and contents of the purported will. As noted by the trial court: "Mr. Jeffers [appellants' counsel], you've got the purported lost and destroyed will which you tell me only one person in the world has ever seen is Mr. O'Sullivan. He denies it exists. [¶] How can you ever possibly prove something that doesn't exist?"

Appellants also contend that further discovery would have brought more witnesses to substantiate the provisions of the destroyed will. This contention is unavailing. The probate of the decedent's estate had been pending since 1987. As to the petition here involved, appellants filed an at-issue memorandum on July 29, 1991 and had served notice of the December 23, 1991 trial date on or about August 28, 1991. Appellants then brought their own motion for summary judgment on October 25, 1991. It thus appears that appellants had ample time to complete their discovery. Even if they had asked for additional time for further discovery (Code Civ. Proc., § 437c, subd. (h)), which they did not, the trial court would have acted well within its discretion by denying that request.

Finally, appellants contend that the trial court failed to specify the reasons for its determination that there was

no triable issue of material fact as required by Code of Civil Procedure section 437c, subdivision (g). This contention is also meritless. Subdivision (g) expressly authorizes an oral statement on the record in open court. That was done at the hearing in this case. In essence the court advised appellants that they were unable to present to the court or advise the court of anyone who says there was a document that they wanted admitted as a lost or destroyed will and thus they were unable to sufficiently prove the contents of such a will. Moreover, even if the court's comments were an insufficient statement of reasons, such defect would not automatically result in reversal. "We need only determine whether the record establishes the [moving parties'] entitlement to summary judgment in their favor." (*Ruoff v. Harbor Creek Community Assn.* (1992) 10 Cal.App.4th 1624, 1627.) Thus, any insufficiency in the court's statement of reasons would be harmless and of no consequence.

Respondents have requested that we consider imposing sanctions against appellants for bringing a frivolous appeal. We believe such request should be denied.

The judgment is affirmed. Respondents shall recover their costs on appeal.

NOT FOR PUBLICATION.

/s/ Fukuto , J.
FUKUTO

We concur:

/s/ Boren , P.J.
BOREN

/s/ Gates , J.
GATES

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

Estate of SHELTON A. McHENRY, Deceased.	Case No. P718653 (Consolidated with Case No. EP000381)
EDWARD S. HALL and WILLIAM DEAN MILLS, Contestants, v. THOMAS E. O'SULLIVAN, JOHN T. LYNCH, et al., Respondents.	STATEMENT OF DECISION (Filed Feb. 14, 1993)

A. Nature of Proceedings

This matter was tried to the Court, without jury, on five days, November 23 and 24, 1992, and on December 7, 8 and 23, 1992, in Department 11 of the above-entitled court, before the Honorable Edward M. Ross, Judge. The Court heard the testimony of sworn witnesses, received evidence and considered argument offered by each of the parties. At the conclusion of evidence offered by Contestants, the Court announced its tentative decision on the record. Upon request of Contestant Edward S. Hall, the Court renders this Statement of Decision in accordance with California Code of Civil Procedure, Section 632 and California Rules of Court, Rules 232 and 520.

B. Appearances of Counsel

Thomas J. Jeffers, Jr., Esq. appeared at the trial on behalf of Contestant William Dean Mills. Bruce S. Ross, Esq. and Terrence D. Franklin, Esq. of Ross & Sacks appeared on behalf of Contestant Edward S. Hall ("Hall"). Marshall W. Vorkink, Esq. and Michael Bergfeld, Esq. of Cummins & White appeared on behalf of Respondent John T. Lynch ("Lynch"). Frank D. Hobbs, Esq. and Janine N. Roper, Esq. of Rutter, O'Sullivan, Greene & Hobbs Incorporated appeared on behalf of Respondent Thomas E. O'Sullivan ("O'Sullivan").

C. Requested Statement of Decision

The Court has been requested to render a Statement of Decision including, among other matters, its findings and conclusions on the following issues, as requested by Hall:

1. Whether the Will of Shelton A. McHenry, dated May 23, 1984 (the "Will") was procured by fraud and/or undue influence. The Court will discuss this matter only insofar as it relates to issue number 2. The Court has continually pointed out that the Will of Shelton A. McHenry has been admitted to probate; the time for filing a contest expired. No contest was filed within 120 days and as the Court of Appeals has affirmed, this is jurisdictional. The residuary clause is in issue because of the status of the drafter being that of an attorney and a beneficiary. However, this Court has consistently refused to be drawn into the non-issue of the validity of the will itself. This has been deemed to be valid by order of the Superior Court and the Court of Appeals. This case was

sent back by the Court of Appeals to decide the validity or lack thereof of the residuary clause only.

2. Whether the residuary clause in the Will was procured by fraud and/or undue influence.

3. Whether O'Sullivan adequately rebutted the presumption of undue influence and/or fraud by clear and satisfactory evidence that:

> a. The "transaction" between O'Sullivan was fair and equitable. (The Court does not really understand exactly what the Contestant means by this. If "transaction" refers to some sort of contractual transaction it is irrelevant. If it refers to the issue of fraud or mistake or undue influence on the part of O'Sullivan it will be discussed in that context.
>
> b. O'Sullivan had taken no advantage of the attorney-client relationship between himself and McHenry.
>
> c. O'Sullivan "fully informed McHenry" as to "all matters relative to the execution of the Will".

4. Whether O'Sullivan and Lynch engaged in a conspiracy to procure the Will and/or the residuary clause contained in the Will through fraud and/or undue influence.

Again, the Court will discuss this thoroughly in reference to the residuary clause. The will itself, *in toto* is a non-issue except as to the residuary clause.

5. Whether O'Sullivan's conduct in preparing the Will or the residuary clause affected the validity of the bequest to Lynch.

6. Whether a presumption of undue influence or fraud was raised by the conduct of Lynch relative to the preparation of the Will and/or the residuary clause.

7. If a presumption of fraud or undue influence was raised by the conduct of Lynch, whether Lynch successfully rebutted that presumption.

In addition to the foregoing, the Court has been requested by Respondents, to supplement its Statement of Decision by addressing the following issues in its Statement of Decision, to the extent they are not addressed in response to Contestants' requests:

1. Whether there was fraud or undue influence exercised by O'Sullivan in connection with the Will.

2. Whether there was fraud or undue influence exercised by Lynch in connection with the Will.

3. Whether there was fraud or undue influence exercised by O'Sullivan in the making of the Codicil to the Will, which Codicil was dated April 20, 1985 ("Codicil").

4. Whether there was fraud or undue influence exercised by Lynch in the making of the Codicil.

5. Whether there was mistake on the part of McHenry in connection with the making of the Will.

6. Whether there was mistake on the part of McHenry in connection with the making of the Codicil.

7. Whether the Codicil republished the Will, so as to cure any defect in execution of the Will.

D. Statement of Decision

1. Factual Findings

O'Sullivan is an attorney, admitted to practice in 1955, and a Certified Public Accountant. He has not been the subject of disciplinary investigation or proceedings by the State Bar of California or by the California Board of Accountancy. O'Sullivan is co-executor and co-residuary legatee in the Estate of Shelton A. McHenry ("McHenry").

Lynch is a co-residury legatee of McHenry's estate, and a former general manager of McHenry's restaurant business.

Contestant Hall is a cousin of McHenry who was the beneficiary of a specific bequest of $5,000.00 in the Will. Until preparation of the Will, Hall had not been named as a beneficiary in any of McHenry's 12 wills and codicils since 1960.

Contestant Mills is a first cousin, once removed, of McHenry. Mills was not named in any of McHenry's wills and codicils from 1960 to 1987.

McHenry came to California in or about 1930. McHenry and his wife, Bernice, were married in 1932. They never had children. At the time of McHenry's death on July 14, 1987, his closest living relatives were cousins (Bernice had predeceased him in 1983), and there were no natural objects of McHenry's bounty.

A few years after coming to California, McHenry became employed as maitre d' of the Somerset House, a then famous restaurant owned by attorney Todd Johnson ("Johnson"). In 1938, with the financial assistance of Johnson and a few others, McHenry opened his own restaurant, The Tail O' the Cock. Johnson became McHenry's lawyer and business and tax advisor.

In 1955, O'Sullivan was hired by Johnson as an attorney. It was in that connection, and shortly thereafter, that O'Sullivan first met McHenry. O'Sullivan began doing McHenry's legal and tax work almost immediately after becoming employed by Johnson. Through the years O'Sullivan became generally involved in McHenry's tax, business and legal matters. O'Sullivan was the personal attorney and business attorney for Shelton A. McHenry for a period in excess of 30 years prior to McHenry's death.

In 1956 O'Sullivan became Johnson's partner in a law firm known as Johnson, Robertson, Sullivan & O'Sullivan. In his practice at that firm, O'Sullivan devoted a substantial amount of his time to the McHenrys' business. From about 1955 until McHenry's death, O'Sullivan did virtually all, if not all, of the McHenrys' legal work. No task of a legal nature was too big or too small for O'Sullivan to do. He represented the McHenrys in substantial real estate transactions; likewise, he performed more modest tasks, such as representing McHenry before the Labor Commission in an employment matter, and in making inquiries of the jury commissioner on behalf of McHenry's employees.

Among the work performed by O'Sullivan for the McHenrys was their estate planning. In 1960, about five years after O'Sullivan began doing legal work for the McHenrys, the McHenrys first asked that O'Sullivan prepare wills for them. The McHenrys' 1960 wills were the first of eleven wills or codicils prepared by O'Sullivan for McHenry between 1960 and 1981. After Bernice died in 1983, O'Sullivan prepared the Will and Codicil for McHenry. An exemplar of each of those instruments was received in evidence.

The McHenrys altered the disposition of their estate with some frequency, and were extremely detailed in their approach. Though they often altered the specifics of the disposition of their property, their general testamentary plan was consistent, and remained the same over the years with only minor variations.

While the McHenrys were both living, their wills were always reciprocal. Their dispositive plan generally involved giving the bulk of their wealth to employees and social friends, leaving specific cash bequests to particular relatives. In each case, the residue of their estate, including their restaurant business, was divided among their key employees and professionals.

From 1960 to 1985 each will and codicil made by them followed that pattern. The McHenrys were private about their legal affairs, and wanted their legal work done only by O'Sullivan. O'Sullivan honored their wishes with circumspection about their estate plan.

The 1960 wills prepared by O'Sullivan named Johnson as one of several contingent co-residuary legatees of

the estate (in the event of the death of both of the McHenrys, Johnson was to receive 10% of the residue of the estate). O'Sullivan made an effort to learn whether a lawyer outside Johnson's firm should prepare the will. Johnson informed O'Sullivan that he had previously raised the issue with McHenry. McHenry did not want any other outside lawyer or law firm doing his legal work, particularly his will, which was considered to be quite personal.

O'Sullivan had conversations to the same effect with McHenry and with Bernice in which they discussed the issue of conflicts of interest. Though O'Sullivan could not specifically recall such a discussion in connection with the 1960 wills (in which O'Sullivan was not a beneficiary), he recalled that such discussions with the McHenrys did occur in connection with their later wills. The McHenrys expressed very strong opinions as to how their estate was to be divided and as to who they wanted to prepare their wills. After a number of years of preparing different iterations of the McHenrys' wills, and the McHenrys' consistent expression of the pattern of distribution of their estate, O'Sullivan no longer addressed with Mr. and/or Mrs. McHenry the issue of conflict of interest.

There was considerable evidence at the trial of detailed instructions given to O'Sullivan as, over the years, the McHenrys' [sic] requested that he prepare their wills and codicils. As numerous exhibits showed, it was usual for the McHenrys to give detailed O'Sullivan directions for the disposal of money or particular items of personal property. The instructions were typically typed

on the McHenrys' letterhead, or were in their handwriting, either in the form of a letter or by interlineation on a copy of a prior will. In each of the McHenrys' wills, the total of specific cash bequests to persons other than family members exceeded the total left to family members. In each will, gifts of personal property were made only to persons to whom the McHenrys were not related. In each will, the residue was left to employees.

The pattern of distribution of the McHenrys' estate over the years is summarized in Exhibit 65 which was received in evidence. It shows the consistency of the McHenrys' provision of relatively modest cash bequests for relatives over the years. The summaries illustrate the McHenrys' practice of leaving the residue of their estate, including their business interests, to their key employees and their professionals.[1] They also illustrate that the residuary gifts would be altered, from time to time, as individuals would come into their employment, leave their employment, or die.

O'Sullivan first became a contingent residuary legatee of the McHenry estate in the McHenrys' 1962 wills. In those wills he was named as a contingent beneficiary of Todd Johnson's contingent gift. In later wills prepared prior to 1981, O'Sullivan was designated to receive from five percent to 16.5 percent of the residue; in the 1981 wills, the bequest was increased to 50 percent.

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[1] The exceptions to this practice involved only McHenry's mother (who was last left a residuary bequest in 1969) and Mrs. Austin Martin (who was left a gift of shares in a public company in the McHenrys' 1965, 1967 and 1969 wills).

Lynch, who began his employment with the McHenrys' restaurant business in 1971, was first named as a residuary legatee of 35 percent in the McHenrys' 1972 codicils to their 1971 wills, and also in their 1975 codicil (55 percent), 1976 will (55 percent) and 1981 will (50 percent). O'Sullivan never discussed the amount or nature of any gift to any person with the McHenrys, and never made any effort to influence them in their disposition of property. He never discussed the McHenry estate with Lynch, or any person other that [sic] the McHenrys. Lynch was not aware that he was a beneficiary of the McHenry estate before McHenry's death in 1987.

In 1975, the McHenrys executed a testamentary trust. The property in the trust was, according to the trust provisions, to pass according to the provisions of the McHenrys' wills.

In 1981, at the McHenrys' instruction, O'Sullivan prepared wills for the McHenrys, no less than the tenth testamentary instrument prepared by O'Sullivan for each of them. The will, as all of those that preceded it, was generally consistent with the previous iterations of the McHenrys' disposition of their property. For the first time, there were only two residuary beneficiaries named in the will; Lynch and O'Sullivan. The testimony showed beyond a doubt that there was no fraud, duress or undue influence exercised by O'Sullivan or Lynch in connection with the making of this will.

In March, 1984, after Bernice's death, McHenry suffered a stroke, and was hospitalized. Though he was effected physically by the event and appeared at times

after it to be depressed, according to his treating physician, Dr. Blake, McHenry remained mentally alert after leaving the hospital in early December, 1984. Dr. Blake described McHenry as a distinguished, eloquent individual.

McHenry also suffered for several years from loss of sight attributable to macular degeneration. It is unclear how well McHenry could see to read. Evidence was adduced from Contestants' own witness, Dr. Asano, that, in May, 1984, with vision aids, McHenry could read type smaller than that on this page. Though it was clear from the evidence that McHenry's ability to read was quite limited, it appeared that he was not legally blind.

A short period of time before McHenry signed the Will in May 1984, he instructed O'Sullivan to prepare it, and gave O'Sullivan specific instructions as to its content. The Will differed from McHenry's 1981 will in that it no longer contemplated that Bernice would receive any portion of his estate, as she was then deceased. It increased a gift of monthly income to his mother, and adjusted a cash bequest he made to her. It added a specific bequest of $500,000 for his new wife, Ruth Tullis. It also included gifts of cash for Terry Gillard, for Contestant Hall (who was mentioned for the first time) and Francis Highley (McHenry's cousin, also mentioned for the first time). The new will also adjusted particulars of the residuary bequest, and eliminated specific bequests of personal property to friends.

The provisions of the Will affecting disposition of property were read to McHenry by O'Sullivan, and McHenry looked at portions of the Will before executing

it. The Will was properly executed on May 23, 1984 at McHenry's residence in the presence of two witnesses, Julie Holtz and Robert Freeman, both then (but now former) employees of O'Sullivan's law firm. Testimony was offered that there was neither fraud nor influence, undue or otherwise, exercised on McHenry in connection with the Will. The Will was of a pattern consistent with the estate plan McHenry had fashioned with his deceased wife Bernice since 1960.

Though there was controverted evidence offered to attempt to prove that Lynch was present when the Will was signed, there was no evidence which connected Lynch's presence and the actual signing of the Will, or which showed any act resembling fraud or undue influence by Lynch. Circumstantial evidence offered to prove that Lynch was present when the Will was signed was not consistent, probative or believable.

On April 20, 1985, after the death of McHenry's mother and McHenry's divorce from his second wife, O'Sullivan was asked to prepare, and McHenry executed, the 1985 Codicil. The Codicil was prepared in accordance with McHenry's instructions to O'Sullivan, and it was witnessed and attested by two witnesses unrelated in any way to O'Sullivan. Testimony was offered by O'Sullivan that there was neither fraud nor influence, undue or otherwise, exercised on McHenry in connection with the Will, and there was no evidence whatsoever of any impropriety in connection with the Codicil. The testimony of one of the attesting witnesses, Mr. Rossi, indicated the lack of unusual circumstances surrounding execution of the Codicil.

The last testamentary document prepared for and signed by McHenry was the 1985 Codicil.

There was evidence proffered by Contestants to the effect that McHenry had intended to leave a substantial monetary gift to his personal assistant, Terry Gillard. This was the primary evidence offered by Contestants that McHenry's testamentary intent differed from the content of the Will. Among the ironies in the evidence offered by Contestants is that Gillard would not have benefitted had Contestants prevailed in a contest to the 1984 Will. Dr. Clifton King, McHenry's clergyman, testified that, at one point, McHenry mentioned that he intended to give Gillard $300,000. Dr. King, however, was unclear whether the gift was intended to be testamentary. Dr. King also testified that McHenry said he intended to make substantial provision for Lynch, confirming McHenry's inclination to benefit Lynch, notwithstanding McHenry's concern about losses incurred in the restaurant operations managed by Lynch.

The Court understands McHenry's statements to Dr. King about a proposed gift to Gillard, considering the circumstances under which they were made, to have been braggadocio, and the Court does not believe that he really intended to do what he bragged about doing.

The Will and Codicil were admitted to probate by this court on August 24, 1987, and no timely contest to the Will or Codicil was filed.

2. Discussion

a. Presumption of fraud and/or undue influence by O'Sullivan.

As Contestants have asserted in these proceedings, as the Court of Appeals has stated in its Opinion, and as this Court strongly agrees, the facts that O'Sullivan was the McHenrys' attorney and preparer of the Will and Codicil, and was also a beneficiary of the Will and Codicil, create a presumption that there was fraud and/or undue influence in connection with any gift to O'Sullivan under the Will. In light of that presumption, despite the claim by O'Sullivan of untimely filing of the contest by Contestants, the Court considers that it has an obligation to look into the circumstances under which the gift was made *sua sponte*. In the trial of this action, the presumption of fraud and/or undue influence by O'Sullivan was treated as one affecting both his burden of proof and the burden of going forward with evidence. The Court also examined, *sua sponte*, whether there was any appearance that the gift by McHenry to O'Sullivan was the result of mistake on McHenry's part.

In exercising its obligation to examine the circumstances involved in the gift to O'Sullivan, the Court undertook to consider not only the evidence offered by the parties, but also what might have come into evidence despite any deficiencies in the form or substance of presentation of evidence by Contestants' counsel or what might have been presented if Contestants' original counsel had been more adept.

This court agrees with Contestants that, in order to prevail, O'Sullivan was required to rebut the presumption by no less than "clear and satisfactory" or by "clear and convincing" evidence. Though there is some uncertainty whether the legal standard requires O'Sullivan to produce "satisfactory" or "convincing" evidence, the distinction, if any, is of no import [sic] here, since the Court concludes that O'Sullivan offered evidence which rebutted the presumption under either standard, and in fact did so to the even higher standard of "beyond a reasonable doubt."

b. Evidence offered by O'Sullivan rebutted the presumption of fraud and/or undue influence.

Despite Contestants' objection to the relevance of such evidence, the Court considered the detailed evidence of the McHenrys' testamentary plan, the McHenrys' attentiveness to their estate planning, and the consistency of the plan over the years to be probative of the question whether McHenry intentionally made the residuary bequest to O'Sullivan, or whether the bequest was the result of fraud or undue influence by O'Sullivan, or mistake by McHenry.

The longstanding consistency and attentiveness demonstrated by the McHenrys toward disposition of their estate generally, and in particular to disposition of the residue of their estate, is considered by the Court to be highly probative of McHenry's intent in making the Will of Codicil. O'Sullivan's unrebutted testimony that he exercised no influence as to the amount or type of gift

McHenry proposed to make to any individual, including O'Sullivan, was believed and was corroborated by evidence offered of the McHenrys' own detailed care in the instructions, both oral and written that they gave him each time they revised their estate plan. The disposition of the residue appears consistently to have been the result of the McHenrys' wishes, and according to their instructions.

Contestants have observed, and O'Sullivan admitted, that no continued discussion of the conflict of interest issues accompanied the making of McHenry's 1984 Will or 1985 Codicil, and there was no written expression of McHenrys' recognition of the appropriateness of seeking other counsel in light of the bequest to O'Sullivan when the Will or Codicil were made. Written evidence of such recognition by McHenry would have rendered O'Sullivan's showing that there was not undue influence, fraud or mistake in the making of the Will and Codicil even more compelling. However, the absence of a written acknowledgment by McHenry does not itself require a finding that there was undue influence, fraud or mistake in the making of the Will and Codicil, in light of the overwhelming evidence that the bequest to O'Sullivan was not the result of undue influence or fraud by him, but rather the result of McHenry's own intentions.

Evidence that the bequests to O'Sullivan and Lynch were the product of McHenry's own intention, and not the result of an improper act by O'Sullivan, was abundant and persuasive. The consistent practice of the McHenrys over approximately 25 years, involving more than ten wills or codicils, is strong evidence that the bequest was not the result of momentary caprice, or of O'Sullivan's

capitalizing on McHenry's stroke or visual impairment to cause him to effect an unnatural disposition of his property.

O'Sullivan's own testimony (admittedly self-serving but nonetheless believable) indicated no acts of influence by him. There was no evidence offered by any witness, including those who purported to have been with McHenry on the day the Will was signed, as well as witnesses who were with McHenry on a daily basis, that there was any act (as opposed to opportunity) of undue influence or fraud exercised on McHenry at any time by O'Sullivan or Lynch.

c. There was no presumption of undue influence against Lynch.

There was no evidence introduced which would raise a presumption of undue influence or fraud by Lynch against McHenry. The Contestants did not suggest in their separate trial statement filed with this court that any presumption of fraud or undue influence existed against Lynch, but they suggested that possibility in their request for statement of decision. Even if there were such a presumption, it was rebutted by evidence beyond a reasonable doubt.

d. Contestants' evidence was unconvincing and often illogical.

During the trial Contestants repeatedly attempted to offer evidence not pertinent to the issues of fraud or undue influence. The Court received substantial evidence

offered by Contestants of doubtful or extremely remote relevance to the issues, and none that was persuasive in any way.

1. Marvin Testimony

The offer of proof by Mr. Jeffers on the testimony of witness Howard Marvin ("Marvin") was an illustration in point. On several occasions, the Court requested an offer of proof for the factual basis of Marvin's testimony. Not a single relevant fact was offered. From the Court's perspective, required as it was to speculate about the potential relevance of Mr. Marvin's testimony, it appeared that the only way in which the proffered testimony might have been relevant would be if Marvin were offered to testify that he had participated in a conspiracy, in return for O'Sullivan's including him in McHenry's Will for a bequest of $100,000 in bonds. There was no such offer of proof.

In fact, when Mr. Jeffers made the "offer of proof" regarding the Marvin testimony, it bore no relevance to the issues of fraud or undue influence; the proffered testimony was that, instead of getting the $100,000 bond set forth in the Will, he, instead, actually received twenty $5,000 bearer bonds from the estate. How this was relevant in any manner to show that Lynch and/or O'Sullivan engaged in a conspiracy or fraud or undue influence on McHenry escapes this Court.

The Court was also told that Marvin would testify as to some of the "tricks" that O'Sullivan might have pulled off as a conspiracy. However, despite repeated requests

from the Court, not one single fact probative of such impropriety by O'Sullivan was forthcoming as an offer of proof. Finally, it was indicated that Marvin, who had been close to McHenry, would testify that McHenry would have remembered other friends. The court notes that McHenry did in fact make 27 specific bequests in the 1984 will, in addition to the residuary and other bequests to O'Sullivan and Lynch. Aside from the statement that Marvin would testify that McHenry would have made other bequests, no factual basis for his purported testimony was shown.

2. The Living Trust

One additional matter for which Marvin's testimony was offered was the matter of the 1975 McHenry living trust. Marvin, it was said, would have testified that McHenry had wanted a trust, that it took some time to get O'Sullivan to prepare one for him, and that McHenry thought he had the trust late in his life.

Over O'Sullivan's objection, the Court received evidence relating to the trust, and the trust instrument itself in evidence. Based on the court's independent review, the trust was virtually a bank account in a living trust name. The terms of the trust put the trust property right back into the estate for testamentary disposition, and disposed of the property in accordance with the terms of the McHenrys' wills. The evidence relating to the trust, including the proffered testimony of Marvin relating to same, was a red-herring, as it indicated no fraud in connection with testamentary disposition of the McHenrys' property.

Had the trust, set up in 1975, nine years before the Will, made conveyances of property for the benefit of third parties, or some other disposition, then maybe there could have been a claim that McHenry did not know what was in his estate. Regardless, even if McHenry thought that all of his properties were distributed through his living trust, the testamentary outcome would have been precisely the same.

e. Evidence intended to prove that McHenry signed a will, believing it to be divorce papers was not credible.

At the trial, counsel for contestants attempted to offer evidence for the avowed purpose of proving that on May 23, 1984, when McHenry signed a will in the presence of Lynch, O'Sullivan and a "woman from O'Sullivan's office", he thought he was signing divorce papers. None of the witnesses offered to support that theory provided any foundation for the conclusion Contestants wanted the Court to reach. In any case, as discussed in following sections, testimony of Contestants' witnesses concerning the events that purportedly occurred on May 23, 1984 at McHenry's residence was not believed by the Court.

Besides the weakness of the evidence, the premise that McHenry signed a will when he thought he was signing divorce papers, was highly suspect. Though this action had been pending for more than five years, and though the Contestants had long been familiar with the witnesses offered to support their theory, such premise was not mentioned by Contestants in discovery, and, indeed, did not emerge until the time of trial.

It is apparent to the court that, in this connection, Mr. Jeffers made up the trial as he went along. Mr. Jeffers' statement that, after five years he had just realized that O'Sullivan had slipped a will in amongst divorce papers was nonsensical and symptomatic of the bad faith that was demonstrated in the manner in which Mr. Jeffers conducted this trial. Not only were Contestants trying to conduct a trial by ambush, which the Court would not to [sic] permit, but the premise itself was too raw for this Court to accept. Mr. Jeffers' explanation that he had not had time in the last five years to investigate this matter and that the theory "came together" recently, in light of the longstanding focus of the parties on the events of May 23, 1984, was not credible and cast further doubt on this evidence.

The Court wishes to emphasize that it's comments upon the actions of Contestant's original counsel are made only to indicate the lack of substance to the basic factual foundation of the allegations and not upon the actions of counsel, per se.

f. Proof of conspiracy, fraud or undue influence involving Lynch.

The evidence of fraud or undue influence on the part of Lynch was completely lacking and utterly unconvincing. Based on the evidence, there was no reason for Lynch to have been involved in a conspiracy or fraud with O'Sullivan. Lynch was at least a 50 percent participant in the residue in the McHenry wills ever since 1975. There is no way to explain why Lynch would have helped O'Sullivan procure the 1984 Will, if he already had 50 percent

or more of the residue. In fact, it appears as though Lynch received less in the 1984 Will than he would have under previous wills. It is not credible that Lynch would conspire with O'Sullivan to procure the 1984 Will under those circumstances, and no evidence was offered to explain what his motive might have been.

The only rational explanation might have been that Lynch did not know that he was already a major beneficiary of the McHenry estate, and he thought that a conspiracy with O'Sullivan was the only way to get something. This is merely conjecture and speculation on the part of the Court and in fact appears extremely unlikely. O'Sullivan, also already a 50 percent beneficiary of the estate himself under the 1981 will, and knowing of it, likewise does not appear to have had reason to conspire with Lynch to obtain a new will that made, among other things, a new $500,000 gift to an individual who had been mentioned in the 1981 will for a relatively minor gift of personal property.

If Lynch were a co-conspirator, in what overt act did he engage? The only testimony offered at trial that could have been construed as an overt act was his averred presence at the purported signing of the Will. Contestants attempted to prove this "fact" with the testimony of witnesses Terry Gillard and Ruth Huddleston. Both Terry Gillard and Ruth Huddleston testified that they overheard O'Sullivan telling McHenry that he could not get jewelry back from Ruth Tullis. Neither witness was credible as to the date of this conversation, and the witnesses contradicted each other as to who was present. There was no testimony that a will was shuffled among divorce papers that McHenry was signing.

Gillard was completely discredited at that part of his testimony where he would have had the Court believe that he recognized May 23, 1984 as a date that Lynch was present in McHenry's residence with O'Sullivan. Gillard did not know when McHenry had come home from the hospital; he denied having reviewed the Will to have known the date; and he refused to say how he was sure of events on a specific date, more than eight years in the past. Though Gillard denied that he got the May 23, 1984 date from Mr. Jeffers, the Court was convinced by Gillard's testimony and demeanor that he was not truthful, that he was coached and he was denying it.

The other witness who testified that Lynch was present the date the Will was signed, nurse Rita Huddleston, was also not believable as to her recollection of May 23, 1984 as a particular date on which O'Sullivan and Lynch were present at McHenry's residence. Her recollection appeared to be based only on having reviewed the Will, shown to her by Mr. Jeffers. It was unclear to the Court that the Will could have in any way "refreshed" her recollection. The Will was not signed by Lynch as a witness, and Huddleston testified that she did not see a will executed, or hear one discussed on the date she recalled Lynch having been present at McHenry's residence. She testified to the effect that Gillard was not present on the day Lynch was present at the residence, which Gillard contradicted. Finally, she was certain, but plainly inaccurate (based upon evidence of the actual temperatures of that date which were submitted by O'Sullivan), in describing May 23, 1984 as an extremely warm day. If, in fact, Lynch witnessed the signing of the Will, then we would have a situation where the two

attesting witnesses have lied about the execution of the Will. Both Juli Holtz and Robert Freeman testified that they were present when the Will was executed, and that they signed the Will as witnesses. The Court does not find it reasonable, particularly in light of having observed the testimony of witnesses Gillard and Huddleston, to believe that two semi-strangers to O'Sullivan committed perjury for him. Their testimony, even with minor inconsistencies, cannot be reconciled with the testimony of Gillard or Huddleston.

g. Proof of fraud or undue influence by O'Sullivan.

O'Sullivan and Lynch were alleged to have participated together in Contestants' version of the purported activities at the McHenry residence on May 23, 1984. The evidence offered by Contestants is similarly unconvincing as it relates to O'Sullivan. The conduct attributed to O'Sullivan is also illogical in light of the evidence.

For example, even if O'Sullivan did have two witnesses who were amenable to falsely witness a will in 1984, it is entirely unclear what his motive would have been. Why would O'Sullivan have them witness a bogus will in 1984 giving him 50 percent of the residue, when McHenry already had a 1981 will that gave him the 50 percent? In fact, the 1984 Will appears to bequeath O'Sullivan somewhat less than he would have received in the 1981 will by approximately $250,000, which is half of [sic] amount of McHenry's gift to Ruth Tullis in the 1984 Will.

Why would O'Sullivan have made any improper effort to create the 1984 Will when the 1981 will existed?

Though the 1981 will was not before the Court as a testamentary document, it was in evidence, and it appears to have been a completely solid will. It is corroborated by Bernice's writing in her diary, where there are many notations regarding the 1981 will. Putting McHenry aside, it is almost impossible to believe that Bernice would have written the 1981 will without knowing what was in it, as she quite apparently did with respect to the preceding wills going back to 1975, where Lynch was first mentioned. A review of the evidence indicates that Bernice was almost compulsive in charting her daily activities and thoughts. The validity of the wills in which Bernice was involved appears overwhelming although the court has noted them for evidentiary purposes only and is not actually passing upon them as testamentary documents.

The premise that there was a conspiracy is particularly doubtful in light of the 1981 Will. Neither Lynch nor O'Sullivan stood to gain from the 1984 will. Even if the 1984 Will were bogus, it would appear, ironically, that Lynch and O'Sullivan were not done a favor by Contestants' not contesting the 1984 Will timely. They might have been better off tearing up the 1984 Will and probating the 1981 will. (The Court is of course not advocating this action in any situation but is merely expressing a possible claim of the Contestants.) The 1981 will would appear (the presumption as to O'Sullivan aside) to be absent the purported "taints" Contestants complain about in the 1984 Will. Bernice was there, and there are the testators' own written instructions. It appeared that Bernice and McHenry were in good health in 1981. The fact that the 1981 will has not been found does not raise any

real question in the mind of the Court as to its presumed revocation. In light of the 1984 will and 1985 codicil it does not appear to have been much of a priority to retain a will that has been superseded by two new testamentary documents. The absence of the original 1981 will is consistent with the execution of the new will in 1984 and therefore with the actions of McHenry.

O'Sullivan had been writing wills for McHenry since 1960, and there was unrebutted evidence that he was aware of, and had addressed with the McHenrys, the conflict. While not having protected himself by having written waivers by the McHenrys in each instance is hardly a recommended practice, it appears that McHenry would have wanted to have O'Sullivan prepare the Will in any case. More important, based on the McHenrys' longstanding testamentary pattern, O'Sullivan does not appear to this Court to have influenced McHenry to make a gift to him, either properly or improperly.

There was certain evidence of McHenry's intent to leave Gillard a gift of $300,000 which the Court, as said previously, did not find believable. If, in fact, McHenry had told O'Sullivan to include in the Will a bequest to Gillard $300,000, why would O'Sullivan not have done it? He did, after all, include a bequest to Ruth Tullis for $500,000. Why would O'Sullivan have disobeyed this [sic] instructions and not have included the claimed gift to Gillard of $300,000 if he really were instructed to do so; McHenry was still alive, could read the will, or might have had his closest companion Gillard read it for him. The consequences to O'Sullivan were he found not to have followed McHenry's instructions might have been quite serious. There was also the testimony of nurse

Gladys DuBois, who mentioned that in 1986 McHenry said he would "make it up to Gillard", indicating to the Court that McHenry had not made substantial provision for Gillard at that time. The Contestants' premise does not track and the Court has to reject the premise that McHenry really intended to leave Gillard $300,000 in the 1984 Will.

Finally, witnesses offered by Contestants, some of whom (such as Gillard) were close to McHenry on a daily basis during the time of the alleged misconduct by Lynch and O'Sullivan, could not identify any fraud or undue influence by Lynch or O'Sullivan.

3. Conclusion

1. Whether the Will of Shelton A. McHenry, dated May 23, 1984 (the "Will") was procured by fraud and/or undue influence.

For the reasons set forth above, it is the opinion of the Court that the Will was not procured by fraud and/or undue influence. However, the Court is not making a specific finding on this inasmuch as the Court of Appeals has already held that the will itself is valid due to the absence of a jurisdictionally time-valid contest to the order admitting the will to probate.

2. Whether the residuary clause in the Will was procured by fraud and/or undue influence.

For the reasons set forth above, the Court finds that the residuary clause was not procured by fraud and/or undue influence.

3. Whether O'Sullivan adequately rebutted the presumption of undue influence and/or fraud by clear and satisfactory evidence that:

a. The "transadtion" between O'Sullivan and McHenry was fair and equitable.

Though the Court does not consider this question to be even an issue, the Court finds that the "transaction", inasmuch as it reflected the intentions of McHenry and was not the result of undue influence or fraud on O'Sullivan's part, was "fair and equitable".

b. O'Sullivan had taken no advantage of the attorney-client relationship between himself and McHenry.

For the reasons set forth above, the Court finds that O'Sullivan took no advantage whatsoever of the attorney-client relationship between himself and McHenry.

c. O'Sullivan "fully informed McHenry" as to "all matters relative to the execution of the Will". The Court of Appeals has found that O'Sullivan fully informed McHenry as to all matters necessary for the execution of the Will. There is no evidence that O'Sullivan did not inform McHenry of any matter that would be relevant for the execution of a valid will.

4. Whether O'Sullivan and Lynch engaged in a conspiracy to procure the Will and/or the residuary clause contained in the Will through fraud and/or undue influence.

The court finds that there was no evidence of a conspiracy of any kind between Lynch and O'Sullivan. Further, for the reasons set out above, the Court affirmatively

finds that there was no conspiracy of any kind between Lynch and O'Sullivan.

> 5. Whether O'Sullivan's conduct in preparing the Will or the residuary clause affected the validity of the bequest to Lynch.

Inasmuch as the Court finds that the bequest to Lynch reflected McHenry's testamentary intent, the Court finds that O'Sullivan's conduct in preparing the Will or the residuary clause did not affect the validity of the bequest to Lynch.

> 6. Whether a presumption of undue influence or fraud was raised by the conduct of Lynch relative to the preparation of the Will and/or the residuary clause.

Contestants raised the contention that there was a presumption of undue influence imposed on Lynch for the first time in their Request for Statement of Decision. Contestants did not raise such contention in either their Trial Statement nor in argument to the Court. Moreover, Contestants were mute when the Court stated during trial that there was no presumption imposed upon Lynch. Accordingly, the Court finds that Contestants waived the issue of any presumption as to Lynch.

Regardless of such waiver, for the reasons set forth above, the Court finds that there was no believable evidence which raised any presumption of undue influence or fraud as to Lynch, nor was there any believable evidence concerning conduct by Lynch which would have raised such a presumption.

The evidence at trial showed that Lynch was completely segregated from any discussion with McHenry or

O'Sullivan of wills or modifications to wills. For example, when wills were to be executed at the restaurant, Lynch was ordered to leave the office. Any evidence offered by Contestants attempting to connect Lynch to the execution of the Will was not believable, credible or logical.

> 7. If a presumption of fraud or undue influence was raised by the conduct of Lynch, whether Lynch successfully rebutted that presumption.

As noted above, no presumption of undue influence or fraud was raised or created by the conduct of Lynch. However, the Court has reviewed the evidence presented and finds that, if there had been any presumption, Lynch has rebutted it for the reasons set forth above.

In particular, the evidence at trial established that Lynch had no knowledge of the contents of the Will or the Codicil prior to McHenry's death. Lynch had no discussions with O'Sullivan or McHenry as to the contents of the Will and was not present when the Will was executed. The evidence offered by Contestants attempting to connect Lynch to the creation and execution of the Will was not believable, credible or logical.

Moreover, the Court finds that the testamentary intent of McHenry as to his employees exhibited in prior wills is very persuasive. In particular, the Court finds evidence that the manager of the McHenrys' restaurants before Lynch was a 35-percent beneficiary of a residuary clause in a prior will very compelling. Additionally, the testimony of Contestants' own "non-interested" witnesses confirm that McHenry intended to provide a substantial bequest to Lynch.

With respect to Respondents' requests:

> 1. Whether there was fraud or undue influence exercised by O'Sullivan in connection with the Will.

For the reasons set forth above, the Court finds that there was no fraud or undue influence exercised by O'Sullivan in connection with the residuary clause of the Will. For the reasons set forth above at several locations, the Court is not making an express finding as to the entire will, considering that question to be a non-issue for purposes of these proceedings.

> 2. Whether there was fraud or undue influence exercised by Lynch in connection with the Will.

For the reasons set forth above, the Court finds that there was no fraud or undue influence exercised by Lynch in connection with the residuary clause of the Will. The Court again indicates that it is making no express finding as to the entire will for the reasons that have been previously expressed.

> 3. Whether there was fraud or undue influence exercised by O'Sullivan in the making of the Codicil to the Will, which Codicil was dated April 20, 1985 ("Codicil").

For the reasons set forth above, the Court finds that there was no fraud or undue influence exercised by O'Sullivan in connection with the Codicil.

> 4. Whether there was fraud or undue influence exercised by Lynch in the making of the Codicil.

For the reasons set forth above, the Court finds that there was no fraud or undue influence exercised by Lynch in connection with the Codicil.

> 5. Whether there was mistake on the part of McHenry in connection with the making of the Will.

Based upon its *sua sponte* review of the evidence, and its own inquiry, the Court finds that there was no mistake on the part of McHenry in connection with the making of the Will.

> 6. Whether there was mistake on the part of McHenry in connection with the making of the Codicil.

Based upon its *sua sponte* review of the evidence, and its own inquiry, the Court finds that there was no mistake on the part of McHenry in connection with the making of the Codicil.

> 7. Whether the Codicil republished the Will, so as to cure any defect in execution of the Will.

The Court finds that, there being no irregularity in connection with the making of the Codicil, the Codicil republished the Will, so as to cure any defect in execution of the Will.

4. Disposition

The Court can find no evidence in the record whatsoever of any fraud or undue influence. The presumption of fraud and/or undue influence was completely and utterly overcome by O'Sullivan. There was absolutely no affirmative evidence presented that would raise an independent inference or suspicion, let alone proof of fraud, undue influence, or mistake on the part of O'Sullivan

and/or Lynch. There was no evidence of conspiracy between O'Sullivan and Lynch whatsoever.

Judgment for Respondents is to be entered accordingly.

Dated: FEB 16, 1993

/s/ Edward M. Ross
EDWARD M. ROSS
Judge of the Superior Court